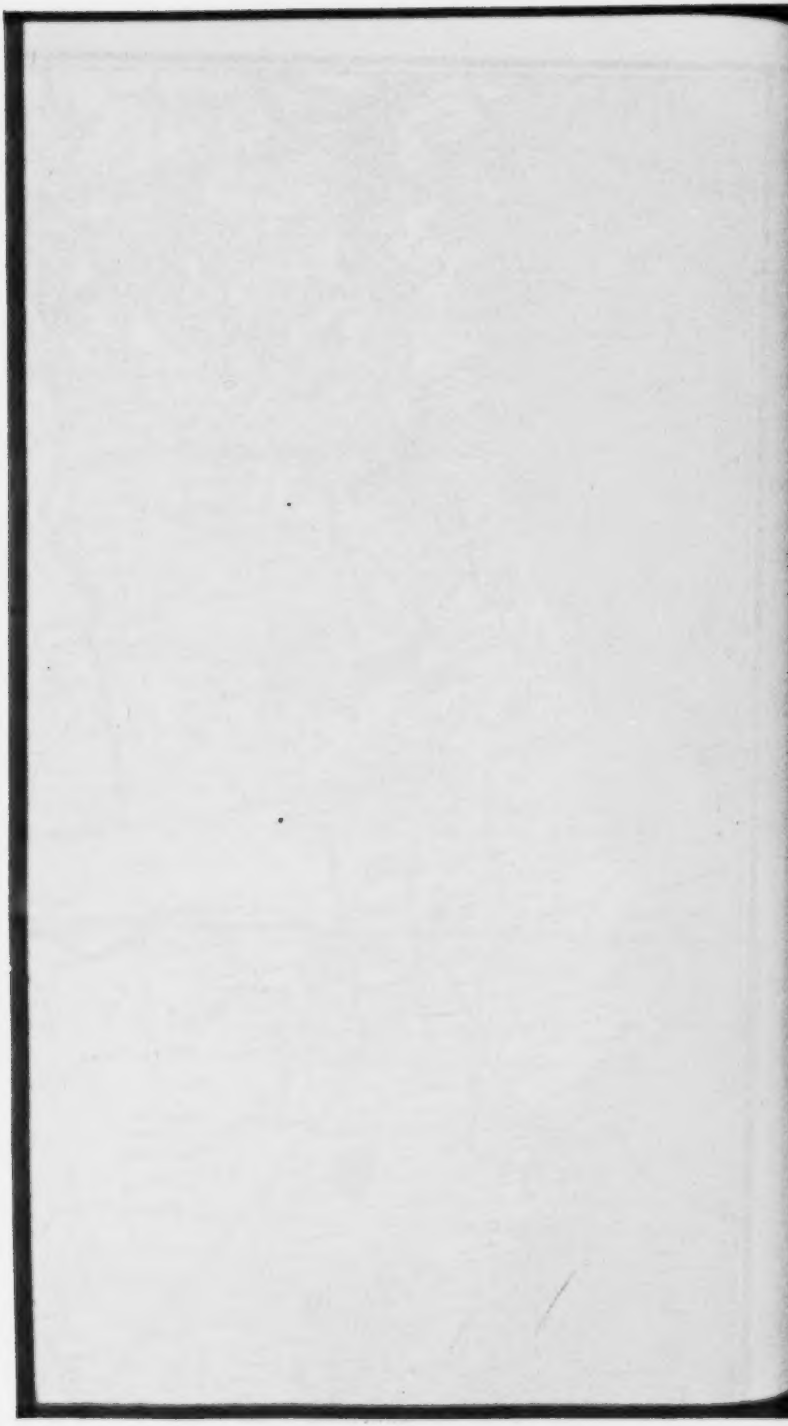

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil No. 1141

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL MILLS, INC., AND MONTANA FLOUR MILLS COMPANY, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

(Filed Feb. 16, 1949)

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree, entered on January 25, 1949 [1] by a specially constituted district court of three judges established pursuant to the Urged Deficiencies Act of October 22, 1913, dismissing appellant's complaint seeking to set aside an order of the Inter-

[1] The court rendered its opinion and made findings of fact and conclusions of law on December 27, 1948.

state Commerce Commission. Appeal was allowed on January 31, 1949, and appeal papers served on February 1, 1949.

The Commission's order,[2] dated December 18, 1947 (as modified on July 7, 1948), required appellant railroad to establish a "transit privilege"[3] for wheat and wheat products milled or stored in

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[2] The order in terms ordered appellant "to establish . . . maintain and apply to the transportation, in carloads, of wheat and wheat products from points on its line in the Triangle Territory in Central Montana to points in California and Nevada, via routes through Butte, Mont., when milled or stored in transit at Great Falls, Mont., rates which shall not exceed the present joint rates from and to the same points over the same routes on shipments of similar commodities not stopped in transit." The order further required the carrier "to cease and desist . . . from publishing, demanding, or collecting for the transportation" of such commodities on such routes from and to the points designated, in connection with the transit arrangements, "rates exceeding the present joint rates."

[3] "The privilege of transit enables grain to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C. . . . The shipper pays the local rate on the inbound shipment to the transit point, B in our illustration. A receipted freight bill specifying the point of origin, the rate paid, and other pertinent data, is recorded with the transit bureau as evidence of intention of further transportation of the inbound grain or its equivalent. When the outbound shipment is tendered to the carrier, the freight bill is surrendered in order that the shipper may obtain an outbound rate lower than that which he would otherwise be compelled to pay." *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 537-538. The privilege which the Commission's order directs the appellant to accord at Great Falls, "like other transit privileges, rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from points of origin to final destination." *Central Railroad Co. of New Jersey* v. *United States*, 257 U.S. 247, 257.

transit at Great Falls, Montana, an intermediate point on existing through routes maintained by appellant and its connections from points in the so-called "Montana Triangle" area [4] to California and Nevada, via Great Falls, and Butte, Montana.

The shippers involved in this proceeding are engaged in the milling of wheat and wheat products at Great Falls, Montana. The appellant railroad and its connecting carriers maintain through routes from the Montana Triangle to California and Nevada via Great Falls and Butte, Montana, as well as more circuitous routes through Great Falls via Oregon and Washington gateways. Joint rates applicable to all of such routes were prescribed by the Commission in a prior comprehensive grain rate proceeding,[5] and the quantum of such rates is not in issue in this case. The rates were fixed at a level sufficiently high to cover exercise of the transit privilege without extra charge.

Appellant allows transit on the joint rates at all intermediate points on its lines on routes through

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[4] As described in the district court's opinion, "This area is embraced within a rough or general inverted triangle with the apex at Great Falls, Montana and the base being a line from Havre on the East and Shelby on the West. Within this general area there is grown a superior kind of hard spring wheat specially desirable for certain purposes because of its high protein content. There is a large market for flour from this wheat in the California market, and mills at Great Falls, Ogden, Utah and other places are in keen competition for that market."

[5] *Grain and Grain Products*, 205 I.C.C. 301, 449-450, sustained in *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534.

the western gateways, but has denied the privilege entirely on its lines through Great Falls via the Butte gateway.[6]

Accordingly shippers at Great Falls are precluded from use of the Butte routes because of high combination rates resulting from the denial of transit privilege on the through routes. Hence in order to obtain transit at Great Falls they must ship via appellant's western routes. Via those routes, however, an out-of-line charge is made in most instances, which must be paid when transit is taken at Great Falls. To remedy this unreasonable practice, prejudicial to complainants engaged in the milling business at Great Falls, the Commission made the order assailed in the case at bar.

This order was based upon the following finding made by the Commission:

> We find that defendant's failure to establish storing and processing in transit arrangements at Great Falls in connection with the present joint rates on wheat and wheat products from the Montana origins described in the complaint to destinations in Nevada and California over routes through Butte, is unreasonable and unduly prejudicial. The establishment of arrangements found reasonable will remove the undue prejudice to which complainant is subjected.

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[6] Other carriers participating with appellant in the through routes via Butte permit transit on the joint rates at all intermediate milling points south of Butte on their lines in Idaho, Utah, Nevada, and California.

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> An order requiring the establishment of transit arrangements found reasonable, will be entered. [269 I.C.C. at 469.]

Appellees submit that this appeal involves no substantial questions. Appellant's position is predicated entirely upon the assumption that the Commission's order is not one requiring the establishment of a reasonable transit practice as an incident of through routes and joint rates already in existence, but that the Commission's order requires the establishment of a *new* route via Great Falls. Only where a new route is being established could there be any occasion for making findings under Sections 15 (3) and 15 (4) of the Interstate Commerce Act.[7] Appellant's whole argument is premised upon the lack of such findings, and collapses entirely with the unsound premise upon which it is

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[7] 49 U.S.C. 15 (3) and 15 (4). Those sections provide that the Commission shall "whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes . . . and the terms and conditions under which such through routes shall be operated" and that "In establishing any such through route the Commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad . . . which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." These "new route" provisions were construed in *Pennsylvania Railroad Co.* v. *United States*, 323 U.S. 588.

constructed. The untenableness of appellant's position is demonstrated plainly by the most cursory consideration of the terms of the Commission's order.[8] The order does not direct appellant to establish a new through route; it directs that the transit privilege be accorded in connection with "the present joint rates from and to the same points over the same routes" which appellant now maintains via Butte.

The Commission clearly explained the basis of its action in the following discussion contained in its report:

> The routes through Butte being open at joint rates which are available in connection with transit at points on lines south of Butte, the only question to be determined is the lawfulness of defendant's practice of denying transit on those rates to complainant at Great Falls. . . . We are clearly empowered upon the allegation and showing made here by complainant to require defendant to establish the requested transit at Great Falls on the present joint rates via Great Falls and Butte. A finding that transit should be established on an existing joint rate and through route is not a prescription of a joint rate and through route within the meaning of section 15 (3), but is merely an incidental requirement necessary to the reasonable and lawful operation of such existing joint rate and through route. There

[8] See note 2, *supra*.

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> is nothing in sections 15 (3) and 15 (4) of the act limiting or restricting our power to prescribe reasonable and nonprejudicial transit practices under sections 1 and 3 of the act in connection with the established joint rates over the Butte routes, which are part of the prescribed general adjustment of rates on grain. As far as the tariffs of defendants are concerned, the Butte routes are offered to the shippers as available routes but high combination rates on traffic transited at Great Falls keep them closed commercially for such traffic. In *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, the Supreme Court held that existing through rates, although they are combination rates, can be found unlawful under sections 1 and 3 of the act without a special finding of public interest essential to the validity of an order establishing through routes under section 15 (3). [269 I.C.C. at 466-7.]

Not only the Commission's findings, but appellant's own admissions as well, indisputably establish the fact that through routes are already in existence from the Montana Triangle to California and Nevada via Great Falls and Butte.

The existence of through routes with joint rates via Great Falls provides adequate foundation for exercise of the Commission's power to require that the transit privilege be accorded at Great Falls in connection with such routes and rates. That such power is conferred on the Commission under Sec-

tions 1 and 15 (1) of the Interstate Commerce Act [9] is demonstrated conclusively by a series of leading cases which are controlling here.

In *Central Railroad Co. of New Jersey* v. *United States,* 257 U. S. 247, 257, it was expressly held that the Commission had power to establish transit arrangements without resort to the provisions of the Act which appellant relies on here relating to establishment of new routes: [10]

> The Commission clearly has power under § 1 of the Act to Regulate Commerce as amended to determine whether in a particular

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[9] 49 U.S.C. 1 and 15 (1). These sections provide that "It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation" and that whenever the Commission finds that any "regulation, or practice whatsoever . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe . . . what . . . regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

[10] Mere establishment of a transit privilege at a point on appellant's own lines does not create a through route. As defined in *St. Louis S. W. Ry. Co.* v. *United States,* 245 U.S. 136, 139, "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'joint rate'. It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is the 'sum of locals' on the several connecting lines or is the sum of the lower rates otherwise separately established by them for through transportation."

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> case a transit privilege should be granted or should be withdrawn. For that Section requires among other things that carriers establish, in connection with through routes and joint rates, reasonable rules and regulations. The Commission might, therefore, acting under § 1, have directed the Central and the Pennsylvania to establish the creosoting-in-transit practice at Newark, if it deemed failure to do so unreasonable or unjust.

The power of the Commission under Sections 1 and 15 (1) of the Act to prescribe reasonable rules and practices in connection with existing through routes and joint rates was reiterated in the recent *Class Rate* case, *New York* v. *United States,* 331 U. S. 284, 342-343, where, after citing the above-quoted language of the *Central* case, the Court went on to say:

> there where the Commission acts pursuant to § 1 to require carriers to establish, in connection with through routes and joint rates, reasonable rules and regulations, . . . the Commission corrects the unlawful discriminatory practice in the case of each carrier by prescribing the just and reasonable rate or practice. The same is true where, as here, the Commission . . . proceeds under § 15 (1) . . .

The same contention which appellant makes here, that findings under the "new route" provisions of the Act are necessary, was rejected summarily and decisively in *Virginian Ry. Co.* v. *United*

States, 272 U. S. 658, 666-67. That case differed from the case at bar only in that there the Commission ordered that reasonable through rates be applied on existing through routes, while here the Commission ordered that reasonable practices with regard to the transit privilege be applied on existing through routes. But the power of the Commission is identical with respect to both of these subjects and is derived from the same statutory provisions. In the *Virginian* case the Court said:

> The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15 (3). But the order here in question was not sought or made under § 15 (3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination . . . The fact that the combination rates were excessive constituted the only obstacle to the movement . . . The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and non-discriminatory . . . The order was sought and made under § 1 and § 3. Section 15 (3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable

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and discriminatory shall be made conformable to law.

It thus becomes plain that, since the existence of through routes and rates via Great Falls is indisputable, and since the Commission's power to direct the establishment of the transit privilege as a reasonable practice incident to the operation of such routes is undeniable, the Commission's order in the case at bar is valid and should be sustained. The Commission here had no occasion to direct the establishment of a new route and the provisions of Sections 15 (3) and 15 (4) relating to that subject never came into play. Appellant's whole case, being bottomed upon the alleged necessity of findings under those sections of the Act, thus rests upon quicksand.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(S.) PHILIP B. PERLMAN,
Solicitor General.

(S.) J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.

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